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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-905

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, ET AL., *Petitioners,*

v.

SECRETARY OF THE ARMY, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY BRIEF

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The Constitutional question raised by the petition for certiorari in this case is far too crucial to the federal Civil Service System and to the separation of powers between the Executive and Congressional branches of our Government to be lost in the sea of confusion created by the Government's brief in opposition. Indeed, as mentioned before, the same vague confusion so thoroughly engulfed the courts below that they ulti-

mately rendered decisions herein which nowhere even remotely refer to or dispose of the unavoidable, fundamental Constitutional question presented by this case under Article I, Section 8 of the Constitution and the Fifth Amendment.[1]

At page 4 of its brief, the Government states: "The district court concluded that the requirement of membership in the reserves *does not conflict with any of the provisions of the civil service laws*, and it entered summary judgment for respondents". But, petitioners contend the requirement of membership in the reserves and forced military-combat service for Civil Service job incumbents *conflicts with Article I, Section 8 of the Constitution* and the *Fifth Amendment*—because Congress nowhere authorized the imposition of such military requirements on *Civil Service job incumbents* by *statute*. They contend further, therefore, that it was thus *unconstitutional* for the Civil Service Commission to impose such military requirements by administrative fiat only. *Ergo,* the district court completely missed the crucial point raised by this case, and the Government is now asking this Court blindly to follow suit.

At page 4 of its brief, the Government states further: "The court of appeals affirmed. It concluded that the Reserve Technician Programs were a rational strategy to provide the reserves with a 'hard core' of highly skilled reservists available for duty." But, petitioners contend that, under Article I, Section 8 of the Constitution, Congress and Congress *alone* has the power to decide whether it is rational or irrational to force thousands of Civil Service job incumbents, such as *clerks, typists, accountants, truck drivers* etc., suddenly to join the military and makes themselves available for combat duty—and petitioners assert that Congress has never extended those constitutional powers to the Civil Service Commission.

[1] The decisions below fail even to mention the Constitutional question under Article I, Section 8 and the Fifth Amendment albeit the Government concedes in its brief in opposition before this Court, at page 2:

> "Petitioners commenced this action . . . to challenge the Reserve Technician Programs of the Army and Air Force on *both Constitutional* and statutory grounds."

The Government's brief proceeds next to try to create the "sea of confusion" mentioned above. It states, at page 4:

> "Petitioners apparently concede that the Army and Air Force could require all technicians for reserve units to be members of the uniformed services. They also apparently concede that the Army and Air Force could establish programs under which some technicians were uniformed military personnel and others were civilian civil service personnel. But, they contend, once the Army and Air Force decided to *allow* civilians to be employed as reserve unit technicians, they were precluded by statutes from requiring those civilians to assume, as a condition of employment, any obligation to accompany their reserve units in time of emergency. This position is unsound." (Emphasis supplied)

But, that is not petitioners' position at all—and the "apparent concessions" attributed to petitioners are completely distorted and erroneous. If Congress, *by statute,* authorizes the Army and Air Force to require all the thousands of typists, clerks, accountants, etc. working for reserve units to be members of the uniformed services, then of course *all* such employees *must* join the military to serve lawfully in those capacities. Similarly, if Congress, *by statute,* authorizes the Army

and Air Force to establish programs pursuant to which some of those thousands of administrative employees should be military personnel while others are civilian Civil Service personnel, then also that system, thus decreed by Congress, must prevail.

But here, Congress has completely failed to pass any such statute. Nevertheless, the Civil Service Commission has *unconstitutionally required* thousands of Civil Service clerks, typists, truck drivers etc.—the overwhelming majority of whom have long years of exemplary employment records in the Civil Service—either to qualify for and join the military and expose themselves to combat service in the event of an emergency or stand to lose their Civil Service jobs, or their Civil Service statutory job retention and promotion rights.

Thus, it is totally misleading and wrong for the Government to suggest in its brief (at page 4) that the "Army and Air Force decided *to allow* civilians to be employed as reserve unit technicians". On the contrary, here the Army, Air Force and Civil Service Commission *forced* thousands of Civil Service job incumbents, with long records of satisfactory service, either to join the military or face the loss of either their jobs or their statutory job rights.

* * *

In its brief, the Government again points, as did the court of appeals, to Title 5 U.S.C. 3101 and 3301 as alleged statutory authority for what the Civil Service Commission has done in this case to force thousands of Civil Service incumbents either to join the military or lose their jobs or statutory job retention and promotion rights.

A mere reading of those two sections of Title 5 makes it crystal clear that neither provision even remotely

clothes the Commission with any such authority. 5 U.S.C. 3101 simply authorizes *all federal agencies* to employ as many Civil Service employees as Congress appropriates from year to year.

5 U.S.C. 3301, in turn, is strictly limited, by its own terms, to the "*admission of individuals into the civil service*" and to "*applicants*", *not Civil Service job incumbents*—but even then, in no sense or manner does it clothe (or was it intended to clothe) the Civil Service Commission with the power to compel military service as a condition of federal Civil Service employment. In fact, never before has the Civil Service Commission attempted to exercise any such *military authority*, and there is nothing in the legislative history of 5 U.S.C. 3101 or 3301 to suggest that Congress had any such intent or purpose when it enacted those provisions.

And, of course, if the Court agrees with petitioners in this regard, then it must rule, we respectfully submit, that the Civil Service Commission's actions in this case ran afoul of Article I, Section 8 of the Constitution, as well as the Fifth Amendment (*Hampton* v. *Mow Sun Wong*, 96 S.Ct. 1895 (1976), and cases cited therein).

Thus, at page 6 of its brief, the Government completely misses the target by arguing: "The Reserve Technician Programs do not conflict with any statute." As pointed out hereinabove, they do more than just that—they conflict with the Constitution of the United States.[2]

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[2] It is equally specious for the Government to argue, at page 6, that "Nothing in the statutes prevents civil service employees from joining the reserves". Such *voluntary action* is not in issue here. Rather, the question in this case is whether the Civil Service Commission may constitutionally *compel* Civil Service job incumbents to join the military.

Finally, the National Guard Technicians Act, 32 U.S.C. 709, has absolutely nothing to do with this case, except to reemphasize that since the Constitution required an Act of Congress to establish that National Guard program, clearly an Act of Congress is equally necessary under the Constitution before thousands of Civil Service employees can be required to join the military and face combat duty in the event of emergency as a price for continuing to hold Civil Service positions they have successfully performed for years.

Certainly, the National Guard Technicians Act did not directly or indirectly license any such federal action, and of course, the Government in reality does not make any such contention.[3]

In *Tennessee* v. *Dunlop*, 426 U.S. 312, this Court upheld the constitutionality of the National Guard Technicians Act. Here, there is no such statute to uphold—because there is no such statute. The challenged programs are thus void under Article I, Section 8 and the Fifth Amendment.

CONCLUSION

The Petition For Certiorari should be granted.

Respectfully submitted:

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[3] The Government here relies, and in the courts below relied, exclusively on 5 U.S.C. 3101 and 3301, as stated in its brief at page 5.